IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REFERENCE No. 2 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAVNA AMIT PATHAKJI & 3 Others.

Versus

AMIT MANAVANTCHANDRA PATHAKJI PLANNING MANAGER & 3 Others.

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Appearance :

Mr NK MAJMUDAR, Miss SHILPA R SHAH, M/S THAKKAR ASSOCIATES, Miss SHALINI S MAIR, Mr ASPI M KAPADIA and Mr SHALIN N MEHTA.

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CORAM : HONOURABLE MR.JUSTICE A. L. DAVE

and

HONOURABLE MR.JUSTICE S. D. DAVE

Date : 23/10/2007

ORAL JUDGMENT:- (Per : A. L. DAVE, J.)

1. While hearing Second Appeals Nos.33, 48, 53, 88, 101 and 114 of 2006, learned Single Judge found that following question arose before him, which called for consideration by a Division Bench and, therefore, directed the Registry to place the papers before the Honourable the Chief Justice for appropriate orders :-

> *"(1) Whether, after amendment of Section 28 of Hindu Marriage Act by Marriage Laws Amendment Act, 1976 (Act No.68 of 1976), a second appeal under Section 100 of the Code of Civil Procedure against the judgment and decree of the First Appellate Court would be maintainable?*

2. By virtue of orders passed by the Honourable the Chief Justice on 17th April, 2007, these matters came to be listed before this Bench.

3. We have heard learned Advocates, Mrs. Pahwa, Miss Shilpa Shah, Mr. N. K. Majmudar, Miss Shalini Nair, Mr. Shalin N. Mehta and Mr. Aspi Kapadia, for the parties. We must place on record that the learned Advocates rendered assistance to us with an objective approach. From their submissions, two views were canvassed. According to learned Advocates, Mrs. Pahwa, Miss

Shilpa Shah, Mr. N. K. Majmudar and Miss Shalini Nair, a second appeal against the decree passed by District Court in an appeal from a decree of the Civil Court in a Hindu Marriage Petition would be maintainable before High Court and would be governed by Section 100 of the Code of Civil Procedure, whereas, according to learned Advocates, Mr. Shalin Mehta and Mr. Aspi Kapadia, a second appeal would not be maintainable before this Court in light of provision contained in Section 28 of the Hindu Marriage Act as it stands after the amendment of 1976.

4. The submissions made by learned Advocates, Mr. Aspi Kapadia and Mr. Shalin Mehta, can be briefly stated thus :-

4.1 If Section 28 of the Act is interpreted to provide for an appeal from a decree passed by an Appellate Court, the number of appeals that can be filed would be unlimited and that cannot be the intention of the Legislature. On the contrary, it would run against the intention of the law makers of curtailing the delay in disposal of matrimonial petitions under the Act.

4.2 Since the right of appeal flows from Section 28 of the Act, the scope of the appeal under the said provision would be as wide as that of a First Appeal in light of the interpretation given by this Court in the case of ***Umiyaben, daughter of Chhotabhai Talsibhai and wife of Ambalal Laxmidas v. Ambalal Laxmidas, 1965 GLR, 714***. The Legislature could not have intended such unfettered right of appeal.

4.3 A decree under the Hindu Marriage Act cannot be considered as a decree as defined in Section 2 of the Code of Civil Procedure and, therefore, Section 96 or 100 of the Code of Civil Procedure would not be applicable and, therefore, a second appeal is not contemplated under Section 28 of the Hindu Marriage Act.

5. On the other hand, the substance of the submissions made by learned Advocates, Mrs. Pahwa, Miss Shilpa Shah, Mr. N. K. Majmudar and Miss Shalini Nair can be narrated thus :-

5.1 Section 28 of the Hindu Marriage Act, as it stands today, is the source giving right of appeal and it makes all decrees made by a Court in a proceeding under this Act appealable. A decree passed in an appeal by a District Court is a decree passed in a proceeding under the Act and, therefore, would be appealable. Section 28(1) of the Hindu Marriage Act also provides that an appeal would lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction. Therefore, if a decree passed in an appeal arising from a decree of Civil Court under the Hindu Marriage Act is to be treated as a decree passed by the District Court in exercise of its original civil jurisdiction, an appeal would lie before the High Court.

5.2 So far as scope of second appeal is concerned, it was contended that Section 21 of the Hindu Marriage Act would govern the question which provides that all proceedings under the Act shall be regulated, as far as may be, by Code of Civil Procedure

subject, of course, to other provisions contained in the Act or subject to such rules that may be made by High Court in this behalf. It was contended that there is no provision in the Hindu Marriage Act repugnant to Section 100 of the Code of Civil Procedure. Under the circumstances, an appeal before the High Court against an appellate decree under the Hindu Marriage Act would be governed by Section 100 of the Code of Civil Procedure.

5.3 It was also contended that the apprehension about innumerable appeals is also out of place in light of Section 100-A of the Code of Civil Procedure.

6. We have examined rival side contentions. We have also gone through the judgments relied upon by learned Advocates.

7. We are called upon to examine and interpret Section 28 of the Hindu Marriage Act, as it stands now. While examining the said question, we have to bear in mind the principles governing such interpretation. The Apex Court in the case of ***Bengal Immunity Company v. State of Bihar, AIR 1955 SC 661*** said that mainly four aspects are required to be considered, namely, (a) What was the common law before the making of the Act?; (b) What was the mischief and defect for which the common law did not provide?; (c) What remedy the Parliament has resolved and appointed to cure the disease?; and (d) The true reason of the remedy.

7.1 The Supreme Court, subsequently, in the case of ***R.M.D.***

Chamarbaugwalla & Another v. Union of India and Another, AIR 1957 SC 628, observed thus :

> *"The Court dealing with interpretation of an Act should have regard to the history of the legislation, the declared object thereof and the wording of the statute."*

8. With the above principles in mind, we propose, now, to examine the question referred to us.

9. In our view, since the question is complex and involves two questions, in order that the question is properly dealt with and answered, it has to be split into two questions -

(A) *Whether, after the amendment of Section 28 of the Hindu Marriage Act, a Second Appeal is maintainable?*

(B) *Whether such Second Appeal would be maintainable under Section 100 of the Code of Civil Procedure?*

10. Section 28, as it exists today, was substituted for the old Section by the Marriage Laws (Amendment) Act, 1976 and it reads as under -

> *"28. Appeals from decrees and orders:- (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable*

as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the date of the decree or order."

While effecting this amendment, recommendations of the Law Commission made in its 59th Report were considered. The Law Commission observed : *"It would appear that most of the remedies conferred by the Hindu Marriage Act (to be pursued by a petition) being of a special character, it would be meaningless to expect that the right of appeal in relation to orders under the Act would be available in any other law. The Code of Civil Procedure (Section 104 and Order 43) could not have anticipated the subsequent passage of the*

Hindu Marriage Act. The narrower view would make it difficult to apply section 28. Similar language is used in the Indian Divorce Act (Section 55) and the uniform interpretation on that section is that Act itself creates the right of appeal. The Special Marriage Act (Section 39) also uses similar language and does not seem to have been interpreted differently from the provisions in the Divorce Act.

At the same time, it appears to us that an omnibus right of appeal against ***orders*** *is not necessary as is likely to delay the proceedings. Generally speaking, an appeal against orders of an interim nature should be excluded."*

10.1 The Law Commission also observed : *"A controversy arose in the past with reference to this part of the section, the question being whether this section itself confers a right of appeal, or whether the reference to "any law for the time bing in force" implies that a right of appeal must be sought in some other law. As the language of the section is not very clear on this point, and has been criticised judicially, the matter requires examination. Almost all High Court now take the view that the right is conferred by section 28. The case law on the subject is reviewed exhaustively in the Andhra Pradesh Full Bench decision and in a recent Bombay case."*

10.2 Thus, it is clear that Section 28 came to be amended for removal of anomaly and the controversy arising out of the decisions of various High Courts.

11. In our view, for decision the question posed before us, one has not to look to either the Code of Civil Procedure or any other provision for finding out the meaning of expression **"decrees"** used at various places under the Act. It is clear from the report of the Law Commission that the Commission felt that marriage petitions needed expeditious disposal and a lot of time was consumed in miscellaneous appeals arising out of interim orders *pendente lite* and, therefore, it recommended for a clear provision providing that appeal against order of interim nature should be excluded and that is how new Section 28, as it exists today, and Section 28A came to be inserted into the statute book while removing old Section 28 by the 1976 amendment. The objections of the Legislature behind the amendment were mainly to enable expeditious disposal of the proceedings under the Act and to remove certain anomalies and handicaps that came to the light after the passing of the Act.

12. Now, if we read Section 28 of the Act, as it stands today, and give plain meaning to the language adopted in the said provision, it is clear that ***all decrees*** made by the Court in any proceedings under the Act are made appealable ***as*** decrees of the Court mainly in exercise of its original civil jurisdiction. The section does not restrict the appealability to any particular type of decree and, therefore, the words '*of decrees*' would take in their sweep even the decrees by Appellate Court. The decrees by Appellate Court are to be treated as decrees of the Court made in exercise of its original civil jurisdiction and, therefore, there is no room for any doubt in holding that decrees by Appellate Court

exercising powers under the Hindu Marriage Act would be appealable. The decrees of Appellate Court, since they are made appealable, the appeal challenging such decrees would be second appeal. The appellate decrees are to be treated as decrees of the Court in exercise of its original jurisdiction and, as provided under sub-section (1) of Section 28, the appeal would lie before the Court to which appeals would ordinarily lie from decision of such Court in exercise of its original civil jurisdiction. A decree of District Court, if it is passed in exercise of original civil jurisdiction, can be challenged before High Court ordinarily and, therefore, a decree in an appeal under the Hindu Marriage Act passed by District Court would lie to the High Court. This is a plain and simple meaning emerging from the language of the section.

13. It is not possible to uphold the contention that reading second appeal in the provision would unnecessarily result into delay in final disposal of litigations under the Act and the Legislature amended Section 28 to exclude Second Appeal. The objects and reasons of the Act and the Law Commission's Report make it clear that the intention behind amending Section 28 was to exclude appeals from interim orders and it cannot be interpreted to exclude second appeals. If that meaning is to be given, it would be contrary to the language of the section itself because the section speaks of all decrees made by Court in any proceeding under the Act being appealable. The word "***as***" used in Section 28 sub-section (1) indicates a clear intention on the part of the Parliament that a decree made by the Court in any proceeding under the Hindu Marriage Act should receive the same treatment with regard to

appealability as decrees made in exercise of original civil jurisdiction. We can look at the provision from a different angle, which would also lead us to the same interpretation. Use of word "***as***" would only indicate that the Legislature contemplated decrees which are not made in exercise of original civil jurisdiction, but are to be treated as decrees made in exercise of original civil jurisdiction and, therefore, the language can be interpreted to be intended to be used for taking in its sweep the appellate decrees. We are, therefore, of a clear view that Section 28 provides for a right of second appeal to challenge appellate decrees as well. It cannot be said that use of words "*in the exercise of its original jurisdiction*" would indicate intention of Legislature that the decrees referred to in the opening sentence of Section 28 are in relation to the decrees made by the Court in its original civil jurisdiction only and not the appellate jurisdiction.

14. The difference appearing in the language of old Section 28 and new section 28, glaringly features absence of word ***"orders"*** so as to exclude their appealability.

14.1 Absence of words *"and may be appealed from under any law for the time being in force*" will have no consequence on the appealability part of the decrees passed by Courts in any proceedings under the Act.

15. It was contended that giving the meaning that Section 28 of the Act also provides for second appeal would mean unlimited number of appeals also does not find any favour with us

for the reason that there exists Section 100A in the Code of Civil Procedure, which runs as under :-

> *"**100A. No further appeal in certain cases**. - Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."*

The contention, therefore, merits rejection and stands rejected.

16. A question was also posed before us during the course of arguments that, if right of appeal is interpreted to flow from Section 28 of the Hindu Marriage Act, provision of Section 100 may not be applicable. In our view, this contention deserves to be rejected in light of provision contained in Section 21 of the Hindu Marriage Act. Though right of second appeal flows from Section 28, the powers of the Court in dealing with the same would be regulated by the provisions contained in the Code of Civil Procedure. We are supported by a decision in case of ***Mohana Srinivasan v. Girija (1980) 1 Madras Law Journal (HC) 321***, where the Madras High Court took a similar view. A Full Bench of the Allahabad High Court in the case of ***Smt. Premlata Sharma v. Bhagwat Prasad Sharma, 1984 ALL. Law Journal 392*** also took the same view.

17. In our view, if provisions contained in Sections 28 and 21 of the Hindu Marriage Act and Sections 100 and 100A of the Code of Civil Procedure are given a harmonious reading, meaning and interpretation, there is no room to question maintainability of a second appeal. For examining the question, reference to the earlier Section 28 and judgments flowing therefrom are not required to be gone into in view of the changed language of the existing Section 28. In this regard, we may also refer to Section 28A, which came to be inserted by the Amendment Act of 1976, which says that all decrees and orders made by the Court in any proceeding under the Act shall be enforced in the like manner as the decrees and orders of Court made in exercise of its original civil jurisdiction. Therefore, for enforcement purpose also, the decrees under the Act are treated as decrees made by Court in exercise of original civil jurisdiction.

18. On the basis of what is discussed hereinabove, we answer the question referred to us by holding that Second Appeal against the judgment and decrees of the First Appellate Court under the Hindu Marriage Act would be maintainable under Section 28 of the Hindu Marriage Act, as it stands after the amendment of Section 28 of the Hindu Marriage Act by Marriage Laws (Amendment) Act, 1976 and not under Section 100 of the Code of Civil Procedure, but the same would be regulated by Section 100 of the Code of Civil Procedure.

19. The Second Appeals are required to be remitted to the

appropriate Bench for decision on merits. The Registrar, therefore, to take appropriate steps.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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